

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KIMBERLI S. PRYOR

Claimant

VS.

PROFESSIONAL NURSING SERVICES

Respondent

AND

PACIFIC EMPLOYERS INS. CO.

Insurance Carrier

Docket No. 1,062,493

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 1, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Matthew L. Bretz, of Hutchinson, Kansas, appeared for claimant. Timothy G. Lutz, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant sustained an accidental injury arising out of and in the course of her employment but failed to give her employer timely notice of the injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 30, 2013, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends she gave timely notice to respondent pursuant to K.S.A. 2011 Supp. 44-520.

Respondent asks the Board to affirm the ALJ's finding that claimant failed to provide respondent with timely notice of her accident. Respondent argues, however, that the ALJ erred in finding claimant sustained an accidental injury that arose out of and in the course of her employment.

The issues for the Board's review are:

1. Did claimant provide respondent with timely notice of her accident?
2. If so, did claimant sustain an accidental injury that arose out of and in the course of her employment?

FINDINGS OF FACT

Claimant was an employee of respondent, a nurses' staffing service. Sometime in 2012, claimant was sent to work at Kaw Valley Center (KVC), a center for children with behavioral issues, as a behavioral health technician (BHT). On June 1, 2012, claimant was playing with some children in the gymnasium. Claimant injured her left shoulder while she was showing the children how to do a cartwheel. Claimant had asked another BHT, Monique, if it was okay if she would perform a cartwheel because she had never seen any staff members perform cartwheels or acrobatics.

Claimant said her job duties were to watch, play with, and educate the children at KVC. She was told that respondent's employees at KVC were to interact with the children and not just sit and watch them. She believed she was interacting and playing with the children when she attempted to perform a cartwheel.

Claimant initially did not tell anyone at respondent about her injury. She did report the injury to someone at KVC. Claimant believed she had just pulled a muscle and thought it would get better, but the problems continued. When the problems failed to go away, claimant reported the injury to respondent on July 6, 2012. Claimant testified the reason she had not reported her injury earlier was because she was "embarrassed about how it happened."¹

Claimant initially sought medical treatment on her own with her primary care physician. After she reported her injury to respondent, she was sent to Dr. Samuelson. She has temporary restrictions from her doctors. Claimant has not been given any work by respondent since July 6, 2012, when she reported her injury.

Ryan Vaughn, vice president of respondent, said that although assigned to KVC, claimant continued to be an employee of respondent and was paid and supervised by KVC. Mr. Vaughn testified that performing a cartwheel would not be considered part of claimant's job duties as a BHT at KVC. While as a BHT, claimant was to engage with the children at KVC, such as reading to them, talking with them, and playing cards with them. Mr. Vaughn said that Monique is employed as a BHT in a similar capacity as was claimant.

¹ P.H. Trans. at 15.

Monique was not a supervisor of claimant and had no authority to authorize any of claimant's activities.

Mr. Vaughn testified that no one from KVC told him that claimant had been injured on June 1, 2012. Mr. Vaughn believed that no one at respondent had any knowledge of claimant's accident until July 6, 2012.

Mr. Vaughn testified that respondent's time cards include a question as to whether an employee was injured on the job. He said that if claimant signed the time card without indicating she had suffered an accident, it was an acknowledgment that she had not been injured. Claimant denied the time card had anything on it about being injured on the job. Respondent did not enter a copy of the time card as evidence in the record.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-520 states in part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.³

ANALYSIS

K.S.A. 2011 Supp. 44-520(a)(1)(A) requires that notice of an accident be provided to the employer with 30 days. Unlike prior versions of the statute there is no extension for special circumstances or just cause. Claimant's undisputed testimony supports that the date of accident is June 1, 2012. Claimant testified that she did not tell her employer that she was injured until July 6, 2012. Claimant testified that she didn't report the accident because she was embarrassed about how the injury occurred. This testimony was presumably proffered as some type of defense or excuse. Unfortunately, there is no embarrassment exception contained in the notice provisions contained in K.S.A. 2011 Supp. 44-520.

CONCLUSION

Based upon the foregoing, it is clear that claimant did not provide notice within 30 days as required by K.S.A. 2011 Supp. 44-520. The issue of whether claimant sustained a personal injury arising out of and in the course of her employment is moot.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated May 1, 2013, is affirmed.

IT IS SO ORDERED.

² K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

³ K.S.A. 2012 Supp. 44-555c(k).

Dated this _____ day of June, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge